Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

(1)

No.

In the Supreme Court of the United States

OCTOBER TERM, 2002

GERALD GRIFFIN,

Petitioner,

–v.–

THE PEOPLE OF THE
STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

Whether in view of the probable unconstitutionality of N.Y. Penal Law § 125.25 (2) the Petitioner was deprived of due process of law under the Fourteenth Amendment of the U.S. Constitution and the Equal Protection Clause by virtue of the fact that the trial judge in the State Court (Judge Patsalos) committed constitutional error by submitting to the jury the crime of "depraved indifference murder" (N.Y. Penal Law Section 125.25(2) of which crime the Petitioner was convicted, but was acquitted of intentional murder under Section 125.25(1) of the N.Y. Penal Law?

Whether "depraved indifference murder" under Section 125.25(2) of the N.Y. Penal Law is even a crime of murder in any degree in view of the fact that it does not require proof that the Defendant or Petitioner herein, had an intent to commit murder and that "depraved indifference murder" under Section 125.25(2) permits a jury to convict a Defendant (Petitioner here) of murder in the second degree even though there is no proof of actual intent to kill anyone and thus the required *mens rea* is indistinguishable from the definition of manslaughter in the second degree (N.Y. Penal Law § 125.15, subd. 1)?

Whether the holding of the Court's below in essence allowed the jury to consider "depraved indifference murder" as a viable degree of murder altogether, in view of the fact that it is effectually indistinguishable from manslaughter in the second degree since both depraved indifference murder and manslaughter in the second degree homicide both recognize that a person who has no intent to kill but merely acts recklessly can be convicted? (See decision of United States District Judge Brieant of the Southern District of New York appearing on pages 24 and 25 of the June 7, 2002 edition of the New York Law Journal holding that the Statute finding

depraved indifference murder is indistinguishable from manslaughter in the second degree and, therefore, depraved indifference murder is an unconstitutional Statute.) [*Jones v. Keane*].

Whether the conviction of the Petitioner of the crime of depraved indifference murder was unconstitutional in view of the fact that the Court below at trial should only have submitted the crime of murder in the second degree (N.Y. Penal Law § 125.25, subd. 1) of which charge the Petitioner was acquitted by the jury?

Whether the order of the trial judge directing the Prosecution to recall a witness who, upon recall, contradicted his prior testimony, constitutes "subornation of perjured testimony", therefore, depriving Petitioner of a fair trial under the Fourteenth Amendment of the U.S. Constitution?

Whether the cumulative effect of the admission of prejudicial evidence by the Prosecution, perjured testimony allowed by the trial judge, improper argument by the Prosecutor in her summation to the jury, failure to prove that Petitioner was responsible for introducing the weapon into the struggle between Petitioner and the deceased, deprived Petitioner of a fair trial in violation of the Fourteenth Amendment of the U.S. Constitution?

PARTIES TO THE PROCEEDING

The parties herein are the People of the State of New York and the Petitioner, Gerald Griffin.

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OPINIONS BELOW

The Judgment of the Kings County Supreme Court dated December 4, 1998 appears at Appendix A to this petition.

The Decision and Order of the Supreme Court of the State of New York, Appellate Division, Second Department dated March 4, 2002 appears at Appendix B to this petition.

The Decision of the New York State Court of Appeals denying Leave to Appeal dated February 24, 2003 appears at Appendix C to this petition.

The Opinion of the United States District Judge Brieant for the Southern District of New York, dated June 7, 2002 in *Jones v. Keane* appears at Appendix D to this petition.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is predicated upon issues affecting the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and Rules 10(c) and 13(3) of this Court's rules, *etc.*

A certificate denying Leave to Appeal to the New York Court of Appeals and denying a rehearing dated February 24, 2003 was issued by the Court of Appeals of the State of New York. (Rule 13(3) of this Court's rules)

Notification required by Rule 29.4(c) has been made upon the Attorney-General of the State of New York.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution Fourteenth Amendment Due Process and Equal Protection Clauses thereof.

The New York State Penal Law Section 125.25, subd. 1, defining murder in the second degree and the New York Penal Law Section 125.25, subd. 2, defining depraved indifference murder in the second degree.

New York State Penal Law Section 125.15, subd. 1, defining manslaughter in the second degree.

No.

In the United States Supreme Court

OCTOBER TERM, 2002

GERALD GRIFFIN,

Petitioner,

-v.-

THE PEOPLE OF THE
STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION AND STATEMENT OF THE CASE

Gerald Griffin petitions for a Writ of Certiorari to review the judgment of the New York Supreme Court Appellate Division, Second Department in this case.

While there are several important issues presented in this petition for Certiorari, *one of the main issues is whether the Petitioner herein was convicted of murder in the second degree under an unconstitutional statute, namely, New York Penal Law Section 125.25, subd. 2, defining depraved indifference murder.*

It is the position of the Petitioner herein, predicated upon a decision of the New York Court of Appeals, in dissent, namely, *People v. Register,* 60 N.Y.2d 270, 469 N.Y.S.2d 599, 457 N.E. 2d 704 (1983), and the decision and opinion of United States District Judge Brieant of the Southern District of New York in *Jones v. Keane*, NYLJ 6/7/02, (pages 24 and 25) holding that the statute defining depraved indifference murder is unconstitutional because it is indistinguishable from the definition of the statute involving manslaughter in the second degree under New York Penal Law Section 125.15, subd. 1, both of which rely upon the concept of homicide involving recklessness rather than the *mens rea* required for murder.

It is the position of the Petitioner herein that since the jury at trial was charged with considering the traditional murder in the second degree under Penal Law Section 125.25, subd. 1, and depraved indifference murder under Section 125.25, subd. 2, but convicted the Petitioner only of subdivision 2 [depraved indifference] that his conviction cannot stand constitutionally since depraved indifference murder is the same as manslaughter, second degree (Penal Law Section 125.15(1)).

This Petition by Gerald Griffin arises out of an incident which occurred on April 22, 1997 in the early morning hours. An individual named Shawntane Bradshaw was fatally shot at 440 Watkins, a part of the Riverdale Towers, and died shortly thereafter at Brookdale Hospital. The Petitioner was charged with shooting the deceased after a verbal argument. Griffin was convicted after a trial of one count of depraved indifference murder, but was acquitted of intentional murder and currently is serving a sentence of 25 years to life.

In November 1997, the Kings County District Attorney's Office obtained an Order to Show Cause to have the Petitioner participate in a line-up in connection with the shooting of Shawntane Bradshaw. Griffin was incarcerated at the time in

the Brooklyn House of Detention on an unrelated matter. Petitioner was represented by private counsel in Kings County Supreme Court which issued an order requiring Griffin to participate in a line-up scheduled for December 4, 1997 at the 73rd Precinct in Brooklyn at approximately 5 p.m. Moreover, it was further ordered that Defense counsel could attend said line-up. On December 3, 1997, Defense counsel telephoned Detective William Hogan, the Detective assigned to the Homicide investigation, who was going to conduct the line-up. Defense counsel informed Detective Hogan that he would not be attending the line-up and instead would be sending his private investigator as his representative.

On December 4, 1997 at the appointed hour the private investigator arrived at the 73rd Precinct and met Detective Hogan and provided him with an opportunity to speak with Mr. Griffin for when it was conducted. Nevertheless, the Detective refused to afford the private investigator the same courtesies and privileges that an attorney would have been afforded. More specifically, the Detective refused to allow the private investigator to be present in the viewing room when any of the witnesses were viewing the line-up. Based on the foregoing improper conduct, the Court granted appellant's motion to suppress the identification procedure conducted by Detective Hogan.

During the People's case, the Prosecution called four civilian witnesses to testify at trial. Each one of these witnesses was either a close relative of the deceased or a very close personal friend.

The first witness to testify was Kema Bradshaw, the 21 year old cousin of the deceased. Ms. Bradshaw claimed that during the early evening hours of April 22, 1997, the decedent went to pick her up along with her friend Shameka Phillips from a party at 440 Watkins Avenue, Brooklyn, New York.

There were over 30 people who attended this party and the individuals there were smoking marijuana and drinking alcohol. Earlier that evening Kema Bradshaw observed the Petitioner outside the building with several unknown individuals and a short time later she saw him at the party.

Shawntane Bradshaw, the decedent, arrived at the party at approximately 12 a.m. with Ranelle Jones, and another friend. Shortly thereafter the decedent left the party with Ms. Bradshaw, Ronell Jones, Shameka Phillips and his other friend, the group went to the elevator and talked as they waited. The Petitioner was also waiting at the elevator with his friend "Derell", "Coop" and "Lucky". They all entered the elevator together and upon arriving at the ground floor the Petitioner allegedly called the decedent a "pussy boy". The colloquy that followed was both brief and non-sensical in that the decedent retorted "who me son?" To which the Petitioner replied "what son?" The decedent then said "nothing son" and put his hand out for a high five. The next thing Ms. Bradshaw remembered was that someone started shooting. She did not know where the shots came from, however, her instinct was to run for cover. When she finally stopped running, she turned and saw Griffin and the decedent in a struggle.

During the struggle the Petitioner and the decedent were face to face for the entire duration of the struggle, and she observed Griffin fire the gun at the decedent's head who then fell to the ground. The Petitioner then ran away. When the police arrived, Ms. Bradshaw identified the Petitioner as the perpetrator.

Anthony Lasane was a close personal friend of the deceased and described him as "like a brother". Lasane said he knew both the Petitioner and the decedent from when they were younger but he admitted that he was closer to the deceased. More significantly, Lasane had a lengthy criminal

history involving frequent shop-liftings from department stores anywhere from three times a week to daily. Additionally, he was arrested for assaulting his girlfriend. Moreover, Lasane smoked marijuana before and at the party, sharing approximately 8 to 10 "blunts" that evening with friends. Along with his marijuana ingestion, Lasane admitted that he drank half a cup of Henessy and some Budweiser beer.

Jermikia Phillips, another friend of the decedent, admitted to ingesting several "blunts" and consuming alcohol prior to the incident occurring. Nevertheless, Phillips testified she recognized the Petitioner from the neighborhood. Phillips also attended the party that night and testified in a manner essentially consistent with that of her good friend Kema Bradshaw. Despite the incident occurring extremely early in the morning, Phillips recalled that the lighting conditions were fine.

All of the Prosecution civilian witnesses, who were friends with each other and the decedent, conceded that the petitioner and the deceased were engaged in a physical struggle. None of the witnesses saw the petitioner aim any firearm directly at the decedent and discharge it. After the incident Ronell Jones ran over to the decedent and tried to grab the petitioner. However, another man aimed a firearm at Jones and Jones stepped back and allowed both men to leave.

The first law enforcement personnel to arrive at the scene was police officer James Sullivan and his partner officer Kirkman. Officer Sullivan heard approximately six shots fired and proceeded directly to the scene of the shooting. When he arrived he saw the decedent lying on the ground, surrounded by twelve other people. The officer noticed two gunshot wounds to the decedent's navel area. Officer Sullivan called for an ambulance and established the crime scene. Shawn

Bradshaw was taken to Brookdale Hospital where he was later pronounced dead.

Officer Sullivan searched the area and found nine shell casings and one deformed copper jacket. Upon ballistic analysis, three of the shell casings were from a 25 caliber weapon which were found near the decedent's body. The remaining six shell casings were from a nine millimeter ruger found towards the edge of the housing complex.

Detective Mulzak concluded that two different guns had been fired at the scene.

Dr. Lucille Tennant performed the autopsy on Shawn Bradshaw. The decedent suffered three gun shot wounds to the body, a laceration and abrasion to the mid-portion of his forehead and some abrasions to his right and left shoulders. One gun shot wound was to the left side of the back. Another bullet entered the left side of the abdomen at the navel and the last bullet entered at the left side of the navel. All three bullets were recovered from the decedent's body and the cause of death was attributed to gun shot wounds. Marijuana was the only drug found in the decedent's system.

Upon examination of the decedent's clothing, Dr. Mary Macajoux, concluded that the weapon was discharged in close proximity to the decedent's body.

On April 23, 1997, Detective William Hogan of the New York City Police Department, was assigned to investigate the death of Shawn Bradshaw. Over the next several months, Detective Hogan unsuccessfully made numerous attempts to locate the petitioner.

In September 1997, Detective Tim Torrell of the Englewood, New Jersey Police Department obtained an arrest

warrant for the petitioner. The petitioner was arrested pursuant to said warrant on September 11, 1997, while staying at 93 Lake Court, Englewood, New Jersey. On September 10, 1998, Detective Robert Tamburri, an expert in firearms and microscopic comparison, tested the ballistic evidence recovered from the scene. The three 25 caliber shell casings were all discharged from the same gun. Moreover, the three bullets recovered from the decedent's body were also from the same gun. Detective Tamburri, however, could not match up the shell casings recovered to the bullets recovered from the decedent's body.

Prior to Detective Hogan's testimony, the People had made a motion, *in limine*, to be permitted to elicit on their direct case the defendant's actual residence as relevant to the issue of flight. The Court ruled that it would allow a police officer to testify that he had an arrest warrant for the petitioner and that with said warrant he went to a New Jersey location and would be allowed to describe his observations.

Nonetheless, with regard to eliciting the address of the petitioner's actual residence, the Court would not allow the People to elicit that fact through the petitioner's identified parole officer because of the highly prejudicial implications. The Court ruled the People could enter this information into evidence as long as they did not identify the petitioner's parole officer. The Court also stated it would accept a stipulation from the parties regarding the petitioner's residence to which both parties agreed.

Prior to calling Detective Hogan to the witness stand, the Court instructed the People that they would allow Hogan to testify concerning his efforts to locate the petitioner and that the People should not elicit from Hogan anything that would refer to the petitioner's parole status. The Defense objected to the entire line of questioning as irrelevant and prejudicial,

however, the Court ruled that such testimony may be relevant to the issue of flight and that in any event the Court was careful to limit its scope.

Before Detective Hogan was called to testify, the Prosecutor took time so that he was sure that Detective Hogan would not mention anything to do with the petitioner's parole status. Nevertheless, Detective Hogan thoroughly explained all the efforts he made to locate the petitioner. Including but not limiting to contacting the Daily News' Most Wanted section and went to three different locations with "parole". Defense counsel immediately objected and the Court sustained the objection and struck the answer. Moreover, the Court directed the jury to disregard it.

After the Detective finished testifying, the Defense counsel moved for a mistrial based on the People's disregard for the Court's Order directing them not to elicit any testimony that the petitioner was on parole. The Court noted that it believed the People did not act in bad faith and in fact made certain efforts to ensure that Hogan's testimony would not mention any indication that the petitioner was on parole. Nevertheless, the Court was concerned that Hogan ignored the Court's instructions. The Prosecutor did argue that she did not believe that the Daily News comment had been improper. The Court aptly noted that by itself the Daily News comment would not have been prejudicial, however, when coupled with the parole testimony, one could easily infer where the Detective obtained the photograph for the newspaper.

The Court refused to grant the Defense motion for a mistrial and instead concluded that the errors could be remedied by recalling Detective Hogan and having him give false testimony. Over Defense counsel's objection the People recalled Detective Hogan to the stand and had him falsely testify that he had obtained the petitioner's photograph, that he

sent to the newspaper for the Wanted poster, from the petitioner's high school year book. Moreover, Detective Hogan also falsely testified that he asked the parole department to assist him in looking for the petitioner because he had received an anonymous phone call that the petitioner was probably on parole. However, the Detective later learned that the petitioner was not in fact on parole. Even though the Court had stricken the Detective's original comments from the record, the Court was still concerned that the information unfairly transferred to the jurors could be stricken from their minds.

The Defendant offered no evidence at trial.

Despite Defense counsel's objections, the Court allowed the Prosecution to submit to the jury both the intentional murder count, as well as the depraved indifference murder count in the alternative. Defense counsel argued that it was the People's position through the entire trial that this was an intentional act and by submitting the depraved indifference murder count to the jury the Court is giving the People two bites at the apple.

REASONS FOR GRANTING THE WRIT

We call to the Court's attention a relatively recent case which was decided by the United States District Court for the Southern District of New York per Judge Brieant and appeared in the New York Law Journal on pages 24 and 25 of June 7, 2002. In that Law Journal report, it reprints a decision and Order by Judge Brieant granting a petition for a Federal Writ of Habeas Corpus in the case of *Jones v. Keane*, and ruled that Penal Law 125.25 (2) (depraved indifference murder) was unconstitutional because it was virtually identical to Penal Law 125.15 (1), manslaughter in the second degree.

In that case, following a jury trial conducted before County Judge Patsalos of Orange County the Defendant-Petitioner was convicted of murder in the second degree (depraved indifference murder) under Section 125.25 (2) of the New York Penal Law and also of related weapons offenses in connection with the murder, but the jury acquitted him of intentional murder under Section 125.25 (1). Judge Brieant points out that - subdivision 2 of Section 125.25 of the New York Penal Law under which that Petitioner was convicted, defines an alternate version of murder in the second degree when "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." Additionally, the Court should note that the Petitioner was acquitted of intentional murder.

Judge Brieant then compares that language with Section 125.15 (1) of the Penal Law which, significantly defines manslaughter in the second degree in relevant part as:

> "A person is guilty of manslaughter in the second degree when:
>
> he recklessly causes the death of another person."

We are challenging the utilization and definition of depraved indifference murder under Section 125.25 (2) of the New York Penal Law, under which section, Judge Brieant concludes that the Petitioner in *Jones v. Keane* sustained a violation of his constitutional rights to equal protection of the law and substantive due process when a trial jury was permitted to convict him of the most severely punished of the two statutory crimes which under the state's reported decisions had become one.

Judge Brieant was referring to the Court's decision in *People v. Register*, 60 N.Y.2d 270, 469 N.Y.S.2d 599 (1983), *cert. den.* 466 U.S. 953 (1984) wherein that Court held that the statutory phrase "under circumstances evincing a depraved indifference to human life" referred only to the factual setting in which a crime occurs and contrasted the case with manslaughter in the second degree by holding that the "statute requires in addition not only that the conduct which results in death present a grave risk of death, but that it also occur under circumstances evincing a depraved indifference to human life".

Judge Brieant went on to cite that Court's decision in the *Register* case by quoting the language of the Court which explained:

> "...this additional requirement refers to neither the *mens rea* or the *actus reus* if it states an element of the crime at all, it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur - objective circumstances which are not subject to being negated by evidence of Defendant's intoxication." That Court went on to explain in the *Register* case that in a "depraved indifference murder" the actor's conduct must present a grave risk of death whereas in manslaughter it presents the lesser substantial risk of death (*Register,* 60 NY 2d at 276)."

Judge Brieant further notes that:

> "There was no rational basis by which a grand jury could choose to indict in this case for depraved indifference murder as opposed to reckless manslaughter, and the trial jury was denied the opportunity to choose between two identical crimes, one of which carries a far lesser penalty. A rational jury

could not be expected to differentiate between a 'grave risk of death' and a 'substantial risk of death' as required by the New York Court of Appeals. This is a distinction without a difference; a trial jury simply cannot slice the salami that fine, as Judges Belacosa and Jasen in dissent have pointed out for all to see."

Under the circumstances, the Federal District Judge herein (Judge Brieant) granted the Writ of Habeas Corpus, and held the statute unconstitutional.

We are equally disturbed by the fact that the trial Court would knowingly and intentionally allow injection of perjured testimony into the trial. We believe that a mistrial should have been granted upon the timely objection made by Defense counsel after Detective Hogan violated the Court's ruling.

In the case of *United States Ex. Rel. Washington v. Vincent,* (2d Cir. 1975) 525 F. 2d 262, *cert. den.* 96 S. Ct. 1147, the Court held that a reversal is required where it is established that the conviction was based upon false evidence, which the prosecutor knew or later learned was false. (525. F2d at 267). Significantly in *Washington v. Vincent, supra,* Judge Costantino had denied a certificate of probable cause because no federal issues were involved, but this Court reversed and granted the certificate and ultimately threw out the prosecution.

Further this Court held, in Washington v. Vincent, supra, that it doesn't matter whether the state solicited the false testimony or merely allowed it to stand uncorrected. (See, *Napue v. Illinois,* 360 U.S. 264, 269, 271-272 (1959) See also, *United States v. Lusterino,* 450 F. 2d 572, 575 (2d Cir. 1971).

Finally in *Davis v. Wechsler,* 263 U.S. 22, 24, Justice Holmes noted... "if the Constitution or the laws of the United

States are to be enforced, this Court cannot accept as final the decision of a state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

CONCLUSION

The writ ought to be granted.

Dated: New York, New York
May 7, 2003

Respectfully submitted,

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APPENDIX A

Certificate of Disposition of the Kings County Supreme Court (Gary, J.) Dated December 4, 1998

Supreme Court of the State of New York
County of Kings

FEE 10.00

THE PEOPLE OF THE STATE OF NEW YORK

against

CERTIFICATE OF DISPOSITION

GRIFFIN, GERALD

Defendant

Indictment No. 12973-97
Docket No. 97K095218
NYSID No. 743000 4Q
Files 12-18-1997

I DO CERTIFY that the records on file in this office indicate that the defendant was charged with the crime(s) of MURD2d, CPW2d, CPW3d and MURD2d

and that on 9-16-1998 the defendant, represented by counsel, was convicted ~~by Plea of Guilty~~ by Verdict of the crime(s) of MURD2d, PL 125.25(1)

and that on 12-4-1998 it was the judgment of the Honorable M. Gary that the defendant be sentenced to 25 yrs. to life CVAF + MSC$155.00 OATC

ENTERED
APR 30 2003
WILBUR A. LEVIN
COUNTY CLERK

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 30 day of April, 2003

WILBUR A. LEVIN
County Clerk
County Clerk and Clerk of the Supreme Court,
Kings County

FEE 10.00

APPENDIX B

Decision and Order of the Appellate Division, Second Department Dated March 4, 2002

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

_____ AD2d _____ Submitted - January 29, 2002

DAVID S. RITTER, J.P.
NANCY E. SMITH
GABRIEL M. KRAUSMAN
SANDRA L. TOWNES, JJ.

1998-11463
The People, etc., respondent, DECISION & ORDER
v Gerald Griffin, appellant.
(Ind. No. 12973/97)

Ruth L. Yang, New York, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Sholom J. Twersky of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Gary, J.) rendered December 4, 1998, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prosecution (*see, People v. Contes*, 60 NY2d 620), we find that it was legally sufficient to establish the defendant's

guilt beyond a reasonable doubt. Moreover, upon the exercise of our factual review power, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see*, CPL 470.15[5]). Resolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury, which saw and heard the witnesses (*see, People v. Gaimari*, 176 NY 84, 94). Its determination should be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record (*see, People v. Garafolo*, 44 AD2d 86, 88).

The defendant's remaining contentions are either unpreserved for appellate review or without merit.

RITTER, J.P., SMITH, KRAUSMAN and TOWNES, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

March 4, 2002

PEOPLE v GRIFFIN, GERALD

APPENDIX C

Certificate Denying Leave to Appeal to the New York State Court of Appeals Dated February 24, 2003

STATE OF NEW YORK
COURT OF APPEALS

Before: Hon. Judith S. Kaye, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, - against - Gerald Griffin, Appellant.	CERTIFICATE DENYING LEAVE UPON RECONSIDERATION

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
February 24, 2003

/s/
Chief Judge

* Order of the Appellate Division, Second Department, entered March 4, 2002, affirming a judgment of the Supreme Court, Kings County, rendered December 4, 1998.

APPENDIX D

Memorandum and Order of the United States District Court for the Southern District of New York (Brieant, J.) Dated May 22, 2002 in *Jones v. Keane*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN JONES,

Petitioner,

- against -

JOHN KEANE, Superintendent, etc.,

Respondent.

02 Civ. 1804 (CLB)
MEMORANDUM
& ORDER

Brieant, J.

By his counseled petition docketed March 6th, 2002, Mr. Brian Jones, a state prisoner seeks a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The following sets forth the findings of fact and conclusions of law of this Court, based solely upon the official record. The petition is timely and, as noted below, all claims have been subject to exhaustion, although the latter point is in dispute.

After a jury trial conducted before County Judge Patsalos of Orange County, Petitioner was convicted of murder in the 2nd degree, (depraved indifference murder) under Section 125.25(2) of the New York Penal Law and also of related weapons offenses in connection with the murder. The jury acquitted him of intentional murder under Section 125.25(1).

On the evening of June 17, 1996, at 11:00 P.M. in the City of Newburgh, Orange County, New York, the Petitioner fired two shots which killed Germaine Fields, an eighteen

year old male who had engaged in a street fight with Petitioner and others. Mr. Fields died. Mr. Jones fled but was arrested the following morning.

On December 20, 1996, the Court sentenced Petitioner on three different counts, the longest of which is nine years to life. The conviction was affirmed on direct appeal (*People v. Jones* 266 AD 2d 636) and leave to appeal was denied by the New York Court of Appeals on May 24, 2000 (*People v. Jones* 95 NY 2d 798). Thereafter, the Petitioner commenced a *coram nobis* proceeding in the Appellate Division claiming for the first time that he had been denied effective assistance of Appellate Counsel. He also moved in the County Court under New York CPL § 440.10, to vacate the judgment because of ineffective assistance by trial counsel. Both of these applications were denied, and leave to appeal from the denial of the Section 440.10 motion was denied by the Appellate Division on February 20th, 2002.

The Jury Challenges

The Petition alleges as a separate ground for relief that the Petitioner's trial attorney was ineffective because he failed to exhaust Petitioner's peremptory challenges and the appellate attorney was ineffective in failing on direct appeal to raise the jury selection issue. A juror, Shirley Grammas, was challenged for cause by defense counsel after she had told the Court that she hoped she would not be selected, and that she had diabetes and high blood pressure and feared that her sugar level and blood pressure might increase if she were involved in a verbal disagreement with other jurors, and that if she became emotionally upset, she might not be able to serve. There was no indication of bias, or that Ms. Grammas could not give a fair and impartial verdict.

Although the prosecutor did not oppose this challenge for cause, it was denied by the trial judge at a time when defense counsel had one peremptory strike remaining. The ineffective assistance is said to arise from the fact that Counsel did not premptorally strike Juror Grammas who became the twelfth member of the panel. The next prospective juror was sworn in as the first alternate without any challenge from Defense Counsel. This point is mentioned by Petitioner as supporting an inference that the Trial Counsel did not fail to exercise his last peremptory because he was concerned over the suitability of the next prospective juror.

No issue involving jury selection was raised by Appellate Counsel and, indeed, Appellate Counsel was not in possession of the transcript of the proceedings during which the jury was selected. The real point is that the trial judge had arguably denied improperly two previous challenges for cause, thereby forcing defense counsel to use two peremptories. In order to preserve these arguably erroneous rulings for appellate review, counsel had to exhaust all his peremptory challenges. This he did not do.

This issue is without merit. To prevail on such an issue, Petitioner must show cause and prejudice. There is no prejudice. The two prior challenged jurors did not serve, and there is no reason to find bias on the part of Ms. Gammas, who simply did not want to serve in a contested trial because of concern over her medical condition, tainted the verdict in any way.

The Incident

Viewed most favorably to the Prosecution, the trial record shows that Petitioner, age 15 at the time of the event, was engaged in a sexual relationship with Latoya Williams, another minor, who was expecting Petitioner's child. Two or

three days prior to the event, Miss Williams had informed Petitioner that Germaine Fields had expressed an intention to stab Petitioner in the stomach. Petitioner had accused Fields of "coming on" to his girlfriend. Fields, a recent arrival in the community and purportedly a member of the Crips street gang, denied doing so.

On the evening of June 17, 1996, at about 11:00 P.M., in the street, three or four doors from Miss Latoya Williams home, she and Petitioner were in conversation, when Fields appeared out of the darkness and began cursing the Petitioner. Latoya's father, John Smith, entered the discussion. The confrontation escalated and ultimately Miss Williams and Fields became entangled in a struggle and both fell to the sidewalk with Latoya on top, being held by Fields.

Petitioner shot Fields twice, from a distance of two feet pointing the gun downward at him while he was lying on the sidewalk on his back.

A large number of witnesses testified to having observed all or part of the crime scene. There was no credible evidence that the deceased was armed, although Petitioner testified he thought this to be the fact. It was clear that a violent fight was in progress immediately prior to the shooting, in which Fields was the aggressor. Both bullets struck Mr. Fields in the neck. He arrived at the emergency room of St. Luke's Hospital without a pulse and not breathing and died either on or shortly prior to arrival. On the early morning of June 18th, 1996, Petitioner was arrested at a motel in Poughkeepsie, registered under a false name.

The Challenge to the Statute

Petitioner testified in his own defense that he had been threatened by Fields and told to leave the scene or he would

get killed. He said that he thought Fields had a gun and was reaching for an object in his pocket which appeared to be a weapon, while Fields was on the ground holding on to Latoya Williams. As soon as Fields' hand entered his pocket, Petitioner fired. Petitioner asserted that he was afraid Fields was going to kill him and was concerned that Latoya had been hurt by Fields. He claimed that at the time he fled he did not know whether Fields had been hit by either bullet. Petitioner testified that he was not trying to kill Fields but was just trying to hurt him. The jury is deemed to have rejected the contention of Petitioner that this intentional shooting was in self defense.

After all the evidence had been received, the defense asked the Trial Judge to charge the lesser included offense of criminally negligent homicide, New York Penal Law § 125.15, but this application was denied. As noted earlier, Mr. Jones was acquitted of intentional murder but found guilty of depraved indifference murder and the two weapons counts.

Sub-paragraph 2 of Section 125.25 of the New York Penal Law under which Petitioner was convicted defines an alternate version of murder in the second degree when "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person". In contrast, Section 125.15 of the Penal Law which defines manslaughter in the second degree, reads in relevant part, as follows:

> "A person is guilty of manslaughter in the second degree when:
>
> 1. He recklessly causes the death of another person".

Petitioner argues as his second claim, that as a matter of constitutional law, there is no statutory distinction between reckless manslaughter, and depraved indifference murder, and that the statutory definition of depraved indifference murder is unconstitutionally vague.

Certainly this is not true on the face of the statutes and Petitioner apparently does not so contend. A persistent series of judicial glosses placed on the statutory use of "depraved indifference murder", by New York's highest court seems to have, in effect, removed any distinction between the two crimes. This, it is contended, thereby violates the constitutional rights of persons convicted under the more serious of the two offenses.

There is a statutory definition of recklessness found in Penal Law Section 15.05. A person acts recklessly "when he is aware of and consciously disregards a substantial and unjustifiable risk that [a result described by a statute defining an offense] will occur or that such circumstances exist." "The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

There are a number of reported cases in the New York courts at all levels holding that the statutory reference to depraved indifference murder is not so vague as to violate substantive due process or equal protection rights of defendants. The words do possess a clear meaning in the general speech of the people and standing alone should be sufficient to give adequate warning to a non-lawyer member of the public as to what conduct is rendered unlawful by the statute. Classic textbook definitions abound: throwing the classic squib into the market place is depraved indifference. The New York Court of Appeals held in *People v.*

Jernatowski 238 NY 188 (1924) that firing two or more shots from the street into a house where the Defendant knew that human beings were present, and killing one of the occupants constituted depraved indifference murder. In *People v. Poplis* 30NY 2d 85, 87 (1972), the New York Court of Appeals upheld the statute in a situation where "repeated brutal, callous and inhuman beatings" inflicted on a small child over several days resulted in injuries producing death.

Later, in *People v. Register* 60 NY 2d 270 (1983), cert. den. 466 US 953 (1984), the New York Court of Appeals considered a factual situation where the Defendant, intending to shoot one Mitchell, shot and killed another person. This case concerned primarily the issue of voluntary intoxication as bearing on intent, and arose in the context of a shooting incident in the early morning in a crowded saloon. The Court in *Register* held that the statutory phrase "under circumstances evincing a depraved indifference to human life" referred only to the factual setting in which a crime occurs and contrasted the case with manslaughter in the second degree by holding that the "statute requires in addition not only that the conduct which results in death present a grave risk of death, but that it also occur under circumstances evincing a depraved indifference to human life". The Court held "this additional requirement refers to neither the *mens rea* or the *actus reus*. If it states an element of the crime at all, it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur - objective circumstances which are not subject to being negatived by evidence of Defendant's intoxication." The Court also held that in a "depraved mind murder the actor's conduct must present a grave risk of death whereas in manslaughter it presents the lesser substantial risk of death (*Register,* 60 NY 2d 276). It went on to hold that the phrase refers to the "wantonness of Defendant's conduct and converts the *substantial* risk present

in manslaughter to a *very substantial* risk present in murder (Id at p.276-277). This seems to be a largely circular definition worthy of the committee that wrote the Internal Revenue Code, and tells us not very much. The dissenting opinion of Judge Jasen observed, and this Court agrees that the *Register* opinion "effectively eviscerated the distinction between manslaughter in the second degree, Penal Law Section 125.15(1) and murder in the second degree, Penal Law Section 125.25(2) with respect to the accused's state of mind", *Register* 60 NY 2d 282.

Later in *People v. Roe* 74 NY 2d 20 (1989), arising out of a killing resulting from Russian roulette (described by the perpetrator as Polish roulette), a majority of the Court, following *Register,* held that depraved indifference murder differs from manslaughter only in that the actor's reckless conduct must be imminently dangerous and present a grave risk of death, while in manslaughter, the conduct need only present a less substantial risk of death. This constitutes another play on words substantially similar to the definition imposed by the Court in *Register* and evoked a dissent by Judge Bellacosa, in which he observed that the majority "finalizes the obliteration of the classical demarcation between murder and manslaughter in this state" Roe 74 NY 2d at 29.

Later cases which continued this anomalous construction placed on the statute initially in the *Register* case include *People v. Cole* 85 NY 2d 990 (1995) and *People v. Johnson* 87 NY 2d 357 (1996). In the latter case, the Court of Appeals held that the language was not unconstitutionally vague, because conduct with depraved indifference to human life is well understood.

This Court agrees that the concept of depraved indifference to human life is well understood, and is

essentially self-defining notwithstanding the confusing glosses placed on the statute by *Register* and its progeny. But when two different statutes are construed by New York's highest Court to reach the same conduct, or indistinguishable conduct, and one carries a far lesser penalty, allowing a grand jury to choose to indict for either one is a clear denial of equal protection.

More likely, once the jury concluded that self defense was not involved, this case really became one of intentional homicide.[1] The opportunity to submit what is at least by appearance a lesser included offense to intentional murder to the jury, as was done in this case, allows hesitant compromisers to reach a verdict under conditions such as in this case, where they were apparently reluctant to convict Mr. Jones of intentional murder. There is nothing in our constitutional jurisprudence to prevent this.

Clearly it cannot be said that the statute is vague as applied in the case of a person who deliberately pumps two shots into the neck of someone who is lying on the ground at a distance of two feet. It is ordinarily thought that one who has received from a statute fair warning of the criminality of his own conduct, is not entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. *Parker v. Levy* 417 U.S. 733, 756 (1973); *United States v. Rybicki,* 287 F. 3d 257, 263 (2d Cir. 2002).

In most cases, where a penal statute is found unconstitutionally vague as applied, the result is that the

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[1] While New York law requires a person asserting self-defense to "retreat to the wall", in practice juries tend to apply the standards of the OK Corral when the facts show a killing really was committed in self-defense.

accused goes free. This is not such a case, because the conduct of which Mr. Jones was convicted, as apparently viewed by the jury, would have resulted in a conviction for the lesser crime of reckless manslaughter. That the New York Court of Appeals has conflated the two statutory crimes is a matter of considerable concern to this Court. That the New York caselaw has merged this offense with the less serious available charge of manslaughter 2d, raises a serious issue of equal protection, and a strong possibility of prosecutorial discrimination against minorities or unpopular defendants. This Court concludes that the conviction for depraved indifference murder as applied to the facts of the case as the jury must have found them violated Petitioners' Constitutional right to the equal protection of the laws, as well as substantive due process. There was no rational basis by which a grand jury could choose to indict in this case for depraved indifference murder as opposed to reckless manslaughter, and the trial jury was denied the opportunity to choose between two identical crimes, one of which carries a far lesser penalty. A rational jury could not be expected to differentiate between a "grave risk of death" and a "substantial risk of death", as required by the New York Court of Appeals. This is a distinction without a difference; a trial jury simply cannot slice the salami that fine, as Judges Bellacosa and Jasen in dissent have pointed out for all to see.

Exhaustion

This Court has left the disputed issue of exhaustion for the last, because the adequacy of exhaustion is best tested by considering that which is to be exhausted.

Petitioner argues, and this Court agrees, that in the context of this case, raising in the state court the issue of insufficiency of the evidence was sufficient to raise ("inextricably intertwined with") a challenge to the statutory

criteria for distinguishing reckless manslaughter from depraved indifference murder.

The requirement for exhaustion is not intended to exhaust the petitioner or his or her lawyers, but is designed to give the state courts the opportunity to address and correct violations of Constitutional rights. That purpose is fulfilled when the state court has a fair and meaningful chance to grant relief on what is substantially the same claim raised in federal court. *O'Sullivan v. Boerckle* 526 U.S. 838, 844 (1999) *Vasquez v. Hillary* 474 U.S. 254, 257 (1986). In the context of this case, if they won't listen to Judge Bellacosa and they won't listen to Judge Jasen, they won't listen to Brian Jones, and no purpose will be served in staying this case for further exhaustion of state remedies.

Conclusion

Petitioner's Constitutional rights to equal protection of the law and substantive due process were violated when a trial jury was permitted to convict him of the most severely punished of two statutory crimes which under the state's reported decisions had become one. The Writ shall issue unless the prosecution within thirty (30) days resentences Petitioner for Manslaughter in the Second Degree. The Clerk shall file a final judgment to that effect which shall provide that its operation is stayed pending appellate finality.

SO ORDERED.

Dated: White Plains, NY
May 22, 2002

/s/
Charles L. Brieant, U.S.D.J.